

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LLOYD WILLIAMS,

Plaintiff/Counter-Defendant-Cross-  
Appellee/Cross-Appellant,

and

UN-REEL, INC.,

Plaintiff/Counter-Defendant-  
Appellant/Cross-Appellee,

v

TVT RECORDS, INC.,

Defendant-Appellee/Cross-  
Appellee,

and

OVERTURE MUSIC, L.L.C.,

Defendant/Counter-Plaintiff-  
Appellee/Cross-Appellant.

UNPUBLISHED  
September 21, 2006

No. 259210  
Genesee Circuit Court  
LC No. 02-073502-CK

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Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff Un-Reel, Inc., appeals as of right the trial court's grant of summary disposition and case evaluation sanctions in favor of defendants. Plaintiff Lloyd Williams cross appeals, joining in the issues raised by plaintiff Un-Reel. Defendant Overture Music, L.L.C., cross appeals the trial court's refusal to award the full amount of requested attorney fees and costs as case evaluation sanctions under MCR 2.403(O). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs were hired to record an album for a musical artist on behalf of London Records. After the project began, London Records decided not to pursue the project, and plaintiffs were not paid for much of their work. Plaintiffs allege that they then reached an agreement to sell

Overture Music a compact disc of the material they had recorded in exchange for \$80,000. Overture Music signed the recording artist, and along with defendant TVT Records, Inc., released the artist's work for sale. This released product included recordings made by plaintiffs.

Plaintiffs filed this action alleging that Overture Music had failed to pay the agreed amount of \$80,000, and that Overture Music was liable for fraud and conversion with regard to its acquisition and use of the compact disc. Plaintiffs also alleged that defendant TVT Records was liable for statutory conversion under MCL 600.2919a for receiving plaintiffs' recordings from Overture Music and then releasing them for sale.<sup>1</sup>

The trial court granted summary disposition for defendants. The court concluded that Overture Music owned the copyrights to the recordings in question and that plaintiffs therefore could not establish that the recordings were converted or fraudulently obtained by Overture Music. For the same reason, the court found that defendant TVT Records could not be held liable for statutory conversion. The trial court thereafter partially granted defendants' request for case evaluation sanctions. The court awarded defendants their requested attorney fees and costs associated with the prosecution of their motion for summary disposition, but relied on the interest of justice exception in MCR 2.403(O)(11) to deny defendants their remaining requested attorney fees and costs.

Plaintiffs first argue that the trial court erred in granting summary disposition for defendants. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the court considered information outside the pleadings, it is apparent that summary disposition was granted pursuant to MCR 2.116(C)(10). *DeHart v Joe Lunghamer Chevrolet, Inc.*, 239 Mich App 181, 184; 607 NW2d 417 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiffs argue that they established support for their claim of "conversion by fraud" against Overture Music and that this claim is not preempted by federal copyright law. We note that the trial court did not find that plaintiffs' claim was preempted by federal law. Rather, the court only relied on federal copyright law to conclude that plaintiffs could not prove conversion. As further explained below, however, to the extent that plaintiffs claim that they also retain certain rights in the recordings in question, their claims are preempted by federal law.

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<sup>1</sup> Plaintiffs also alleged that defendants misappropriated their names and identities. However, the dismissal of that claim is not at issue in this appeal. Similarly, plaintiffs' contention that Overture Music's counterclaim was unenforceable under the statute of frauds is not at issue in this appeal. The counterclaim was voluntarily dismissed by Overture Music.

Plaintiffs alleged that the compact disc obtained by Overture Music contained artistic material that Eric Dorsey recorded in plaintiffs' studio for London Records, and that Overture Music converted the recordings by falsely claiming that it would pay plaintiffs for them. However, plaintiffs' claim is unavailing because Overture Music established that it had acquired the rights to Dorsey's work on the project.

"[C]onversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Thus, a person cannot convert his own property. *Id.*

At his deposition, Williams testified that he gave the compact disc of Dorsey's recordings to Overture Music because he hoped Overture Music would sign Dorsey and assume the debt that London Records owed plaintiffs. In order to prove their claim for conversion, however, it was necessary for plaintiffs to establish that they had rights in the recordings that were superior to those of Overture Music. It is undisputed that Dorsey initially made the recordings as a "work made for hire" for London Records. All rights in the recordings therefore accrued exclusively to London Records, 17 USC 201, and London Records accordingly owned all of the recordings, including the master recordings, even though plaintiffs retained possession of them. Plaintiffs' mere possession of the master recordings did not give them the right to sell the performances on those recordings. 17 USC 202; *Harris v Emus Records Corp*, 734 F2d 1329, 1336 (CA 9, 1984); see also *Morrill v The Smashing Pumpkins*, 157 F Supp 2d 1120, 1124-1125 (CD Cal, 2001). Moreover, because Overture Music acquired London Records's and Dorsey's rights to the recordings through its assumed name, "Pollution Distribution,"<sup>2</sup> Overture Music could not have converted or defrauded plaintiffs out of the compact disc in question. *Foremost Ins Co*, *supra* at 391.

Relying on *Hi-Tech Video Productions, Inc v Capital Cities/ABC, Inc*, 58 F3d 1093 (CA 6, 1995), plaintiffs appear to argue that they too retained certain rights in the recordings as a result of their contributions. However, to the extent that plaintiffs argue that defendants' actions were inconsistent with these alleged rights, their claims are preempted as a matter of federal copyright law. See *Daboub v Gibbons*, 42 F3d 285, 289-290 (CA 5, 1995).<sup>3</sup>

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<sup>2</sup> Plaintiffs assert that there was a genuine issue of fact regarding whether the assignment of rights to "Pollution Distribution" conferred those rights on Overture Music. Specifically, plaintiffs contend that "Pollution Distribution" is not the same entity as Overture Music. However, plaintiffs could offer no admissible evidence to show that the two entities were not one and the same.

<sup>3</sup> We further find no support in the record for plaintiffs' argument that the agreement between Dorsey and Pollution Distribution somehow applies to plaintiffs' work on the project and required that plaintiffs execute certificates of employment. That agreement was executed after plaintiffs had already completed their work.

Plaintiffs may not complain about the wrongful or fraudulent conversion of property that they did not own.<sup>4</sup> The trial court properly granted summary disposition in favor of Overture Music with respect to plaintiffs' state law claims for conversion and fraud.

Plaintiffs also challenge the dismissal of their claim against TVT Records for statutory conversion under MCL 600.2919a. MCL 600.2919a requires evidence of *actual* knowledge of the conversion of property; constructive knowledge is insufficient to prove liability. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197-200; 694 NW2d 544 (2005). To the extent that plaintiffs' claim rests on TVT Records's alleged constructive knowledge that Overture Music did not own the recordings in question, the statutory conversion claim must fail as a matter of law. *Id.* Moreover, plaintiffs failed to produce evidence that TVT Records had *actual* knowledge that Overture Music did not have ownership rights in the tracks that TVT Records produced for distribution. Steven Gottlieb, the president of TVT Records, submitted an affidavit denying any knowledge of how the recordings were obtained. Plaintiffs did not present any evidence to contradict this evidence. Although plaintiffs assert that Gottlieb's credibility should be decided by a jury, plaintiffs were required to present evidentiary proofs creating a genuine issue of material fact when responding to defendants' motion. Plaintiffs' mere assertion that the credibility or reliability of defendants' evidence should be decided by a jury is insufficient to withstand summary disposition in the absence of evidence factually supporting plaintiffs' claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

In addition, as previously discussed, Overture Music had acquired the rights to the recordings that plaintiffs allege were converted, and plaintiffs failed to establish that they had superior rights to those of Overture Music. Thus, plaintiffs cannot prove that TVT Records violated MCL 600.2919a when it received the allegedly converted recordings from Overture Music. The trial court properly granted summary disposition in favor of TVT Records under MCR 2.116(C)(10).

Plaintiffs next challenge the trial court's award of case evaluation sanctions to defendants under MCR 2.403(O). In its cross appeal, defendant Overture Music challenges the trial court's decision to award it case evaluation sanctions limited to its attorney fees associated with the prosecution of its motion for summary disposition.

The parties do not dispute that the trial court was authorized to award case evaluation sanctions under MCR 2.403(O). Plaintiffs argued below that the trial court should decline to award sanctions under the interest of justice exception of MCR 2.403(O)(11). The trial court ultimately decided to award case evaluation sanctions for attorney fees associated with the prosecution of defendants' motion for summary disposition, but relied on the interest of justice exception to deny defendants' remaining fees and costs.

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<sup>4</sup> We reject any lingering notion that plaintiffs' claims may have been based on the physical compact disc itself rather than on the musical content recorded on the compact disc. See *Systems XIX, Inc v Parker*, 30 F Supp 2d 1225, 1230-1231 (ND Cal, 1998).

As this Court stated *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005):

A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, because a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). An abuse of discretion may be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

MCR 2.403(O)(11) provides an exception to the general rule that sanctions must be imposed when a party rejects a case evaluation award and the opposing party receives a more favorable verdict. The rule provides that a court may refuse to award sanctions "in the interest of justice." This exception is not to be applied too broadly or too narrowly. *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 448; 702 NW2d 637 (2005). Instead, there must be unusual circumstances to justify application of the exception. *Id.* at 448-449.

Plaintiffs argue that the exception is applicable here because defendants did not timely produce copies of the written agreements demonstrating their rights in the recorded material. It is true that the misconduct of the prevailing party may be an unusual circumstance to trigger the "interest of justice" exception. *Id.* at 449. However, we find no evidence of improper conduct justifying application of the exception in this case. We agree with the trial court that Overture Music was not required to attach the written agreements to its counterclaim under MCR 2.113(F), because its counterclaim did not involve a claim on a written instrument. Additionally, the relevant documents were later produced and made available to the parties.

Furthermore, there is no merit to plaintiffs' argument that the interest of justice exception should have been invoked because defendants could have earlier moved for summary disposition. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 391; 689 NW2d 145 (2004). Unlike the situation in *Harbour*, *supra* at 467-468, defendants did not wait until after trial began to bring their motion. Plaintiffs have not demonstrated any unusual circumstances that would warrant application of the interest of justice exception to avoid an award of sanctions.

We agree with Overture Music that the trial court abused its discretion to the extent that it relied on the interest of justice exception in MCR 2.403(O)(11) to limit its award of case evaluation sanctions to fees associated with the prosecution of Overture Music's motion for summary disposition. The trial court appeared to rely on the economic disparity of the parties to justify its decision. But a financial disparity between the parties, without more, is insufficient to constitute an unusual circumstance to invoke the interest of justice exception. See *Haliw v City of Sterling Hts*, 257 Mich App 689, 707; 669 NW2d 563 (2003), *rev'd on other grounds* 471 Mich 700 (2005). Because this case did not involve unusual circumstances that warranted invoking the interest of justice exception of MCR 2.403(O)(11), the trial court erred in relying on that provision to limit its award of case evaluation sanctions to fees associated only with the prosecution of the motion for summary disposition. We therefore reverse the trial court's

specific award of sanctions and remand this case for reconsideration of Overture Music's actual fees and costs under MCR 2.403(O).

In light of our resolution of the issues in this case, we decline to address the remaining arguments raised by the parties on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen